INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provision and statutes involved	2
Statement	2
Summary of argument	7
Argument:	
Since, historically, an arrest without a warrant for a felony is lawful although there is time to obtain a warrant, seizure of contraband without a warrant at the time of arrest is also lawful	9
A. Historically, and by statute, a warrant of arrest is not necessary to arrest for a felony even where there is time to obtain a warrant	12
B. Since the arrest was lawful, the seizure of contraband open to view at the time of arrest was also lawful	24
Conclusion	45
Appendix	47

CITATIONS

Cases:	
Adams v. *New York*, 192 U. S. 585	34
Agnello v. *United States*, 269 U. S. 20	28, 41
Avignone v. *United States*, 12 F. 2d 509	37
Banks v. *Farwell*, 21 Pick. 156	25
Beckwith v. *Philby*, 6 B. & C. 635	13
Bennett v. *United States*, 145 F. 2d 270, certiorari denied, 323 U. S. 788	34
Benton v. *United States*, 28 F. 2d 695	18, 36
Cardinal v. *United States*, 79 F. 2d 825	18, 37
Carroll v. *United States*, 267 U. S. 132	9, 11, 13, 14, 28, 42, 43
Carvalho v. *United States*, 54 F. 2d 232	37
Cline v. *United States*, 9 F. 2d 621	21
Crabb v. *United States*, 99 F. 2d 325	19, 38
Crane v. *United States*, 44 F. 2d 894	18, 36
Davis v. *Russell*, 5 Bing. 354	7, 14
Davis v. *United States*, 328 U. S. 582	41
Delafoile v. *State*, 84 N. J. L. 381	7, 21
Dillon v. *O'Brien*, 20 L. R. Ir. 300, 16 Cox C. C. 245	27
Dillon v. *United States*, 279 Fed. 639	37
Elias v. *Pasmore*, [1934] 2 K. B. 164	27
Entick v. *Carrington*, 19 How. St. Tr. 1029	13, 40
14 East 17th Street, In re, 65 F. 2d 280	34, 44
Go-Bart Co. v. *United States*, 282 U. S. 344	9, 18, 29, 43

Cases—Continued

	Page
Harris v. *United States*, 331 U. S. 145	8, 24, 31, 33, 40, 41
Hilsinger v. *United States*, 2 F. 2d 241, certiorari denied, 266 U. S. 622	35
Holley v. *Mix*, 3 Wend. (N. Y.) 350	7, 11
Houghton v. *Bachman*, 47 Barb. 388	26
Johnson v. *United States*, No. 329, this Term, decided Feb. 2, 1948	9, 31, 32, 41, 42
Kent v. *United States*, 157 F. 2d 1	17
Kneeland v. *Connally*, 70 Ga. 424	26
Kurtz v. *Moffitt*, 115 U. S. 487	11, 13
Lefkowitz v. *United States*, 285 U. S. 452	30
Marron v. *United States*, 275 U. S. 192	18, 29, 34, 44
Martin v. *United States*, 62 F. 2d 215, certiorari denied, 288 U. S. 617	18
Maryland v. *Soper* (*No. 1*), 270 U. S. 9	19
McBride v. *United States*, 284 Fed. 416, certiorari denied, 261 U. S. 614	36
McGuire v. *United States*, 273 U. S. 95	39
McShann v. *United States*, 67 F. 2d 655	37
Milam v. *United States*, 296 Fed. 629, certiorari denied, 265 U. S. 586	35
Milburne, *In re*, 77 F. 2d 310	44
Miller v. *United States*, 9 F. 2d 382	18, 36
Neagle, *In re*, 135 U. S. 1	15
The Ng Ka Py Cases, 24 F. 2d 772	37
O'Connor v. *United States*, 281 Fed. 396	37
Papani v. *United States*, 84 F. 2d 160	19
Paper v. *United States*, 53 F. 2d 184	34
Rohan v. *Sawin*, 5 Cush. (Mass.) 281	7, 13, 14
Rouda v. *United States*, 10 F. 2d 916	18
Samson v. *United States*, 26 F. 2d 769	36
Samuel v. *Payne*, 1 Doug. K. B. 359	13
Sayers v. *United States*, 2 F. 2d 146	36
Scher v. *United States*, 305 U. S. 251	18, 38, 43
Seib v. *United States*, 150 F. 2d 673	17
Shew v. *United States*, 155 F. 2d 628, certiorari denied, 328 U. S. 870	18, 38
Smallwood v. *United States*, 68 F. 2d 244	36
State v. *Robbins*, 124 Ind. 308	27
Steele v. *United States*, *No. 1*, 267 U. S. 498	8, 33, 34, 36, 44
Steele v. *United States*, *No. 2*, 267 U. S. 505	19
Taylor v. *United States*, 286 U. S. 1	9, 42
Todd v. *United States*, 48 F. 2d 530	18, 36
Tyler and Witt v. *London and S. W. R. Co.*, Cab. & El. 285	27
United States v. *Camarota*, 278 Fed. 388	35
United States v. *Charles*, 8 F. 2d 302	35
United States v. *Daison*, 288 Fed. 199	17
United States v. *Di Re*, 332 U. S. 581	18, 21

Cases—Continued Page
United States v. *Edelson* 83 F. 2d 404 44
United States v. *Feldman*, 104 F. 2d 255, certiorari denied, 308 U. S. 579 19, 38
United States v. *52 Cases Distilled Spirits*, 62 F. Supp. 749 17
United States v. *Jankowski*, 28 F. 2d 800 35
United States v. *Kaplan*, 89 F. 2d 869 44
United States v. *Lee*, 274 U. S. 559 29, 39
United States v. *Old Dominion Warehouse*, 10 F. 2d 736 35, 37, 44
United States v. *One 1942 Pontiac Sedan Automobile*, 56 F. Supp. 929 17
United States v. *135,019 Gallons, More or Less, of Wine*, 56 F. 2d 1064 37
United States v. *Seltzer*, 5 F. 2d 364 35
United States v. *8935 Cases of Distilled Spirits*, 55 F. Supp. 84 17
United States v. *Two Soaking Units, Etc.*, 48 F. 2d 107, certiorari denied, 284 U. S. 627 35, 44
Vachina v. *United States*, 283 Fed. 35 36
Vecchio v. *United States*, 53 F. 2d 628 36
Wade v. *Chaffee*, 8 R. I. 224 7, 14
Wakely v. *Hart*, 6 Binn. (Pa.) 316 13
Weeks v. *United States*, 232 U. S. 383 8, 28
Wida v. *United States*, 52 F. 2d 424 18, 37
Williams v. *United States*, 66 F. 2d 868 18
Zap v. *United States*, 328 U. S. 624 34, 39
Constitutional Provision:
Fourth Amendment 47
United States statutes:
Act of March 1, 1879, c. 125, Sec. 9, 20 Stat. 327 15, 52
Act of June 18, 1934, c. 595, 48 Stat. 1008, 5 U. S. C. 300a 22
Act of March 22, 1935, c. 39, 49 Stat. 77, 5 U. S. C. 300a 23
Internal Revenue Code:
2810 33, 47
2814 33, 48
2831 33, 48
2833 33, 49
2834 50
3116 8, 17, 24, 32, 35, 36, 50
3117 20, 51
3121 (a) 7, 17, 51
Judicial Code, Sec. 33 19
Liquor Law Repeal and Enforcement Act of August 27, 1935, c. 740, 49 Stat. 872:
Sec. 3 20, 21, 55
Sec. 8 17, 37, 38, 55
Sec. 9 16, 17, 21, 56
Sec. 201 19, 21, 37, 56

United States statutes—Continued Page

National Prohibition Act of October 28, 1919, c. 85, Ti. II, 41 Stat. 305:
Sec. 2 ..... 20, 21, 52
Sec. 25 ..... 36, 37, 53
Sec. 26 ..... 43, 54
Sec. 28 ..... 16, 21, 54
R. S. 1014 (18 U. S. C. 591) 20
18 U. S. C. 593 ..... 7, 15, 17, 23, 52

State statutes:
Mass. Rev. Stat. (1836), c. 142, secs. 1–2 41
N. J. Rev. Stats., sec. 33: 2–3 22
3 N. Y. Rev. Stat. (1859), p. 1040 41
N. Y. Rev. Stat (1829) V. 1, c. IV, sec. 11 26

Miscellaneous:
4 Blackstone, *Commentaries*, 290–295 12
26 C. F. R. Cum. Supp., c. I, Sec. 183.10–183.29 33
Federal Rules of Criminal Procedure, Rule 41 (e) 39
2 Hale, *Pleas of the Crown*, pp. 73–98, 114 ..... 12, 40
2 Hawkins, *Pleas of the Crown*, pp. 115–137 12
Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 673. 12

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 427

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE AND RIORDAN J. A. ROETT, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The *per curiam* opinion of the circuit court of appeals (R. 111) is reported at 163 F. 2d 828. The opinion of the district court (R. 103–106) is reported at 70 F. Supp. 764.

JURISDICTION

The judgment of the circuit court of appeals was entered October 7, 1947 (R. 111–112). The petition for a writ of certiorari was filed Novem-

ber 5, 1947, and was granted December 15, 1947 (R. 113). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a seizure without a warrant of contraband open to view at the time of an arrest for a felony being committed in the presence of the officers, is unreasonable within the meaning of the Fourth Amendment merely because the officers had opportunity prior to the arrest to obtain warrants of arrest and search.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourth Amendment and the statutes involved are set out in the Appendix, *infra*, pp. 47–57.

STATEMENT

The four petitioners and three other persons were arrested on the night of June 3, 1946, by investigators of the Alcohol Tax Unit, Bureau of Internal Revenue (R. 3, 7–9). On June 4, 1946, a complaint was sworn out by one of the investigators before a United States Commissioner for the District of New Jersey charging the persons arrested with various violations of the Internal Revenue Code arising out of their ownership and operation of an illicit distillery (R. 6–7). After a preliminary examination before the Commis-

sioner on June 18, 1946 (R. 4–93), petitioners were held to answer in the District Court.[1]

On February 5, 1947, prior to the return of an indictment against them, petitioners filed in the District Court for the District of New Jersey a motion alleging that on the night of the arrest the government agents had illegally seized "a still, alcohol, mash and other equipment," and asking "that all such evidence be excluded and suppressed at any trial * * * and that all of the aforesaid property * * * be returned" (R. 3). At the hearing on the motion, petitioners offered in evidence the record of the preliminary examination before the Commissioner (R. 4–93), and the Government submitted affidavits of the agents who took part in the arrest (R. 93–103). The district court held that the search and seizure were not unreasonable and denied the motion (R. 103–107). Upon appeal to the Circuit Court of Appeals for the Third Circuit, the order of the district court was affirmed (R. 111–112).

The evidence before the district court came entirely from the government agents and from Kell, the informer. So far as it relates to the

[1] This latter fact does not appear in the printed record, but we have been so informed by the United States Attorney for the District of New Jersey. From the same source we learn that petitioners have been indicted for the offenses charged and that the prosecution is pending.

issues raised by the petition for a writ of certiorari it may be summarized as follows:

During January 1946, petitioner Roett approached Kell and proposed to rent a section of Kell's farm on which Roett would erect a building (R. 70–73). Other meetings followed, during some of which Roett was accompanied by the other three petitioners (R. 38–39, 74–76). Kell became suspicious and reported to an agent of the Alcohol Tax Unit that a still was to be erected in the building (R. 72–73, 78–79). Kell was told by the agents that he could accept Roett's offer provided he did nothing to entice or encourage petitioners into going ahead with their plans (R. 56, 65–67, 79–82). In February, one of the agents, Nilsen, was assigned to act in an undercover capacity, living and working as a hand on the Kell farm; his instructions were, not to entice or encourage petitioners in any manner, but to act the part of a "dumb farm hand" and to accept work at the still if petitioners should offer it (R. 54, 60, 96–98).

Toward the end of March 1946, Kell agreed with petitioners to let them rent part of his property for $300 a month (R. 59, 76–77). Kell and Nilsen assisted petitioners in the erection of the building (R. 47, 82–83, 95), which was not a dwelling, but a roughly constructed barn (R. 9), situated approximately 200 yards from the Kell farm house (R. 13). Nilsen also assisted in the erection of the still and the vats (R. 47, 95).

Operation of the still commenced about May 13, 1946 (R. 98). Nilsen acted as "mash man," receiving a salary of $100 a week (R. 44–47, 95). During all this period Nilsen made periodic reports to his superiors and turned over to them samples of the alcohol from the still (R. 42–43, 58–59, 63, 95–96, 98–99); after May 26, 1946, he used a two-way portable radio set to contact his fellow officers, and on May 31, 1946, he supplied information which led to the seizure of a truckload of alcohol about an hour after it had left the Kell farm (R. 93–94, 96, 98–99).

At about 9:00 P. M. in the evening of June 3, 1946, Nilsen informed his superior that the still operators were awaiting the arrival of a load of sugar and that alcohol was to be taken from the farm when the sugar truck arrived (R. 99). At about 11:00 P. M. Nilsen reported that the truck had been delayed but that Roett and Antoniole were at the still (R. 99–100).

At about 11:45 three agents were driven to the farm by Kell in Kell's car (R. 94).

The odor of fermenting mash and the sound of a gasoline motor were noticeable as the car was driven on to the farm premises, and both became stronger as the agents alighted from the car and approached the building housing the still. One of the agents, Van De Car, went around one end of the bulding and came upon an open door through which he could see in the

lighted interior a still column, a boiler, and a gasoline pump in operation. He also saw petitioner Antoniole bending down near the pump. Acting on the theory that a crime was being committed in his presence, he entered the building and placed Antoniole under arrest. (R. 7–8, 12–17, 94, 96, 99–100, 102.)

After the arrest, Van De Car "seized the illicit distillery" (R. 24, 102). He then observed in the building a large number of five-gallon cans which he found to contain alcohol and some vats which contained fermenting mash (R. 10, 103). Another agent, Casey, testified that he could see several of these cans through the open door before he entered, that he later counted the cans and found that there were 262 of them, and that after he entered he saw four large mash vats and other distillery equipment (R. 94). A small truck standing in a cleared space before the still house was searched by another agent, Gettel (R. 100), but it does not appear that anything was taken from it.

The other six persons arrested were apprehended later (R. 8–9). Among that group was one Pugliese who arrived with a truck loaded with coke (R. 61). Nilsen had never seen Pugliese before he was apprehended (R. 31).

The officers did not have a search warrant or warrants of arrest (R. 12, 63).

SUMMARY OF ARGUMENT

In this case, agents, making an arrest for a felony committed in their presence, seized contraband, open to view, constituting the instrumentalities of the very crime for which the arrest was made. The question is whether the right to arrest and seize, otherwise well-established, is affected by the circumstance that, under the facts of this particular case, there was time to secure warrants both for the arrest and the seizure.

A. Historically, a warrant of arrest has never been required to justify an arrest for a felony even though there is time to obtain a warrant. English and American cases have specifically so held. *Davis* v. *Russell,* 5 Bing. 354; *Holley* v. *Mix,* 3 Wend. (N. Y.) 350; *Rohan* v. *Sawin,* 5 Cush. (Mass.) 281; *Wade* v. *Chaffee,* 8 R. I. 224.

As to the particular offenses here involved, the common law has received the additional support of specific congressional legislation empowering marshals to arrest without a warrant. 18 U. S. C. 593. The powers thus conferred on marshals have, we believe, also been conferred on agents of the Alcohol Tax Unit by Sec. 3121 (a) of the Internal Revenue Code (26 U. S. C. 3121 (a)). But even if agents have only the powers of arrest under state law, the common law pertains in New Jersey where this arrest was made. *Delafoile* v. *State,* 54 N. J. L. 381. Hence the arrest without a warrant was lawful.

It is submitted that a right to arrest recognized as not in conflict with the Fourth Amendment since the time of its adoption, cannot now be deemed unconstitutional.

B. Since the arrest was lawful, seizure of contraband open to view at the time of the arrest was also lawful. The right, at the time of a lawful arrest, to seize instrumentalities of the crime for which the arrest is made is supported by a long, unbroken line of English and American authorities. It has been recognized by numerous decisions of this Court from *Weeks* v. *United States,* 232 U. S. 383, 392, through *Harris* v. *United States,* 331 U. S. 145, and never yet questioned.

The seizure provisions of Section 3116 of the Internal Revenue Code do not require a warrant to justify the seizure of contraband where entry has been lawfully made for a purpose other than search, and where the property declared contraband by that section is open to view or lawfully uncovered. *Steele* v. *United States No. 1,* 267 U. S. 498. A search warrant has no function to serve in such circumstances since the breach of privacy, pursuant to the lawful entry, has already occurred.

Time to obtain a warrant becomes of the essence only where the entry is made for the pur-

pose of search or seizure, and not for some other lawful purpose. In such circumstances, a warrant serves as a key to unlock the doors of privacy and a warrant must, if practicable, be obtained. The decisions of this Court discussing the time element have all involved situations where the entry was made for the specific purpose of searching or seizing and not for some other purpose. *Johnson* v. *United States*, No. 329, this Term, decided Feb. 2, 1948; *Taylor* v. *United States*, 286 U. S. 1; *Carroll* v. *United States*, 267 U. S. 132; *Go-Bart Co.* v. *United States*, 282 U. S. 344, 358.

In the case of seizure of contraband open to view at time of an arrest, the factor of opportunity to obtain a warrant goes to the reasonableness of the arrest, and not of the seizure. The reasonableness of the right to arrest without a warrant is a matter for legislative, and not judicial judgment.

ARGUMENT

Since, historically, an arrest without a warrant for a felony is lawful although there is time to obtain a warrant, seizure of contraband without a warrant at the time of arrest is also lawful.

Considering, in isolation, the events which occurred on the night of June 3, when petitioners were arrested and the property involved in the present proceeding was seized, we have the following situation:

Agents of the Alcohol Tax Unit, having reason to suspect that an illegal still is being operated on certain premises, enter the farm upon which the suspected still is located with the consent of the owner of the farm. The operation of an illegal still involves the commission of a number of felonies (see Appendix, *infra*, pp. 47–50). As they approach a crude building, obviously not a registered distillery (see, *infra*, p. 33), about 200 yards from the farm house, the odor of fermenting mash and the sound of a gasoline motor are very marked. Through an open door in the building, they see a still with a gasoline pump in operation and someone bending down near the pump. They arrest the man at the still and seize the still which is open to view. They also see in open view vats containing fermenting mash, other distillery equipment, and cans normally used for alcohol. They seize these articles as well. While the agents are making the seizure, other persons, obviously familiar with the premises, arrive about midnight, some with materials clearly intended for use at the still. Such persons are also placed under arrest. Other persons, known to be involved in the illegal operations, are also arrested.

Were those facts the complete picture, we think there could be no question about the validity either of the arrests or of the seizure of the property here involved. It is to be noted that we have here a case involving seizure of contra-

band open to view, and not a case involving a right of search incident to an arrest.[2]

The right of law enforcement officers to arrest for a felony committed in their presence has never been questioned. See *Carroll* v. *United States*, 267 U. S. 132, 156–157; *Kurtz* v. *Moffitt*, 115 U. S. 487, 504. And the right to seize instrumentalities of the crime, which are in themselves contraband, at the time the arrest is made, at the place where the offense is being committed, has been recognized and, where necessary, upheld in numerous decisions of this Court. See pp. 28–32, *infra*.

The question in this case is whether those well-established rights are affected by the circumstance that, in this particular case, before the arrest and the seizure of the still and the other materials, the agents had sufficient time and information to obtain warrants, both for the

[2] In the affidavit submitted by agent Gettel on behalf of the Government, he stated that he had searched a truck in the clear space in front of the still house "for papers and things of an evidentiary nature" (R. 100). It does not appear that anything was taken from the truck. Petitioners in this action seek the return of "a still, alcohol, mash, and other equipment necessary and appertaining thereto" (R. 3). Those articles had been seized by agents Van De Car and Casey (R. 94, 102–103), before Gettel's search of the truck and independently of Gettel's search of the truck (See R. 100). Since, therefore, the present proceeding does not relate to the truck or anything found therein, this case presents only the problem of the right to seize contraband irrespective of whether the search of the truck was or was not justified.

arrest and for the seizure. We consider that issue, first in relation to the arrest and then in relation to the seizure.

A. *Historically, and by statute, a warrant of arrest is not necessary to arrest for a felony even where there is time to obtain a warrant.*—As to the arrest, the question at issue, i. e., whether a warrant of arrest must be obtained when law enforcement officers have sufficient time and information to obtain one, has been answered in the negative by several hundred years of history. It has never been the law, in the absence of specific legislation to such effect, that warrants of arrest must be obtained to make an arrest for a felony. To the contrary, at the time of the adoption of the Constitution and ever since, except where the rule has been changed by statute, it has been established law, in England and in federal and state courts, that a law enforcement officer or a private citizen may make an arrest for a felony committed in his presence, where a felony has in fact been committed; and that a peace officer may arrest on reasonable cause to believe that a felony has been committed and that the person arrested has committed it. 2 Hale, *Pleas of the Crown,* pp. 73–98; 4 Blackstone, *Commentaries,* 290–295; 2 Hawkins, *Pleas of the Crown,* pp. 115–137; Wilgus, *Arrest Without a Warrant,* 22 Mich. L. Rev. 541, 673, particularly at 548–550 and 685–689; *Car-*

roll v. *United States,* 267 U. S. 132, 156–157; *Kurtz* v. *Moffitt,* 115 U. S. 487, 504; *Rohan* v. *Sawin,* 5 Cush. (Mass.) 281, 284–285 (1850); *Wakely* v. *Hart,* 6 Binn. (Pa.), 316, 318–319 (1814); *Samuel* v. *Payne,* 1 Doug. K. B. 359 (1780); *Beckwith* v. *Philby,* 6 B. & C. 635 (1827).

As the article by Wilgus, cited above, makes clear, the power to arrest without a warant preceded the development of warrant procedure and was never supplanted by the warrant procedure. In fact, in the period immediately preceding the American Revolution, the invasion of personal liberty resulted, not from the conduct of law enforcement officers acting without a warrant, but from the abusive use of warrants. Thus, the evil of the warrant involved in *Entick* v. *Carrington,* 19 How. St. Tr. 1029, arose from the fact that it empowered the executive officers to do that which they could not do without a warrant, i. e., arrest on suspicion without probable cause. Similarly, the writs of assistance were warrants. And when the Fourth Amendment to the Constitution provided that no warrants should issue except on probable cause, it was certainly, at least in part, designed to make certain that warrants should not be used to authorize arrests which could not be made without a warrant.

The specific issue of whether a warrant of arrest must be obtained by a constable when there is time for him to obtain one was raised in the

776919—48——3

English case of *Davis* v. *Russell*, 5 Bing. 354, decided in 1829; the Court of Common Pleas there held that a warrant was not necessary. Best, C. J., said (5 Bing. at 363):

> It has been further contended, that without a warrant from a magistrate a constable has no right to apprehend upon suspicion, unless there be danger of escape if he forebear to apprehend. The law, however, is not so.

Gaselee, J., said (5 Bing. at 368):

> As to the point about the probability of escape, none of the authorities cited go the length of saying that the constable cannot detain, except where he has reason to apprehend an escape.

That decision, announced within forty years after the adoption of the Fourth Amendment, obviously reflects the state of the common law at the time that Amendment was adopted.

The same issue was also raised in early American state cases and it was again specifically held that a warrant need not be obtained even though there was time to obtain one. *Holley* v. *Mix*, 3 Wend. (N. Y.) 350–353 (1829); *Rohan* v. *Sawin*, 5 Cush. (Mass.) 281, 286 (1850); *Wade* v. *Chaffee*, 8 R. I. 224, 225 (1865).

Inasmuch as the Fourth Amendment must be interpreted in the light of the common law as it existed when the Amendment was adopted (*Carroll* v. *United States*, 267 U. S. 132, 149), it is

clear that there is no constitutional requirement that a law enforcement officer must obtain a warrant of arrest when he has time to do so, on pain of having the arrest held invalid.

As to particular offenses here involved, the common law of arrest has received the additional support of specific congressional legislation. By Section 9 of the Act of March 1, 1879, c. 125, 20 Stat. 327, 341, Congress provided that—

> Where any marshal or deputy marshal of the United States within the district for which he shall be appointed shall find any person or persons in the act of operating an illicit distillery, it shall be lawful for such marshal or deputy marshal to arrest such person or persons, and take him or them forthwith before some judicial officer named in section one thousand and fourteen of the Revised Statutes, who may reside in the county of arrest or if none, in that nearest to the place of arrest, to be dealt with according to the provisions of sections ten hundred and fourteen, ten hundred and fifteen, ten hundred and sixteen of the said Revised Statutes.

That provision, still in force (18 U. S. C. 593), was passed at a time when United States marshals were in fact, as well as in theory, the law enforcement officers, the "peace officers," of the United States. See *In re Neagle*, 135 U. S. 1, 59. The powers thus given to the marshals were subsequently conferred on the particular agents who

in later times were given the duty of enforcing federal laws relating to intoxicating liquor. Section 28 of the National Prohibition Act of October 28, 1919, c. 85, Title II, 41 Stat. 305, 316, provided:

> The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

After Repeal, when new legslation was necessary to enforce the remaining federal laws relating to distilled spirits, the Liquor Law Repeal and Enforcement Act of August 27, 1935, c. 740, 49 Stat. 872, 875, provided in Section 9:

> The Commissioner, his assistants, agents, and inspectors, and all other officers, employees, or agents of the United States, whose duty it is to enforce criminal laws, shall have all the rights, privileges, powers, and protection in the enforcement of the provisions of this title and of Title III of the National Prohibition Act, which are conferred by law for the enforcement of any laws in respect of the taxation, importation, exportation, transportation, manufacture, possession, or use of, or traffic in, intoxicating liquors.

That provision now appears as Section 3121 (a) of the Internal Revenue Code (26 U. S. C. 3121 (a)).[3]

We submit that this section is clearly sufficient to confer upon the Commissioner and his agents the power, given to a marshal by 18 U. S. C. 593, to arrest wthout a warrant persons operating an illegal distillery.

However, only one district court decision has specifically so held. *United States* v. *Daison*, 288 Fed. 199, 203 (E. D. Mich.). Apart from that ruling, despite the many cases of arrests and seizures by prohibition agents and agents of the Alcohol Tax Unit during and after prohibition,

---

[3] In 1939, Section 9 of the 1935 act was codified with the provisions of Title III of the National Prohibition Act relating to industrial alcohol and, as codified, was enacted as part of the Internal Revenue Code, 53 Stat. 363. It is clear, however, that the powers conferred by that section were not intended to be confined to the enforcement of laws relating to industrial alcohol alone. Section 3116 of the Internal Revenue Code (Section 8 of the Act of August 27, 1935) has been similarly codified although by its terms it expressly provides that:

"It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this title, or of Title III of the National Prohibition Act, or the internal revenue laws * * *."

The courts have treated Section 3116 as not being limited to industrial alcohol. *Kent* v. *United States*, 157 F. 2d 1 (C. C. A. 5); *Seib* v. *United States*, 150 F. 2d 673 (C. C. A. 8); *United States* v. *52 Cases Distilled Spirits*, 62 F. Supp. 749 (E. D. La.); *United States* v. *One 1942 Pontiac Sedan Automobile*, 56 F. Supp. 929 (E. D. Ill.); *United States* v. *3935 Cases of Distilled Spirits*, 55 F. Supp. 84 (D. Minn.).

there appears to be no authoritative decision on the question of the exact statutory basis of their power to arrest. This Court in some of its leading cases during the prohibition period, *Marron* v. *United States*, 275 U. S. 192, 198; *Go-Bart Co.* v. *United States*, 282 U. S. 344, 356, cases not involving illegal distilleries, assumed that prohibition agents did have the power to arrest without a warrant without specifying the basis of that power. In *Scher* v. *United States*, 305 U. S. 251, this Court made the same assumption as to agents of the Alcohol Tax Unit enforcing liquor laws after the repeal of prohibition, recognizing their power to search a moving vehicle despite the absence of a provision similar to Section 26 of the National Prohibiton Act specifically imposing on agents the duty to seize liquor being illegally transported.[4] Lower federal courts, usually without discussion, have consistently upheld the power of agents to arrest and seize, both before[5] and after[6] Repeal.

---

[4] The majority opinion in *United States* v. *Di Re*, 332 U. S. 581, 589-587, does not mention or cite the *Scher* case.

[5] *Crace* v. *United States*, 44 F. 2d 894, 895 (App. D. C.); *Martin* v. *United States*, 62 F. 2d 215, 217 (C. C. A. 1), certiorari denied, 288 U. S. 617; *Rouda* v. *United States*, 10 F. 2d 916, 918 (C. C. A. 2); *Benton* v. *United States*, 28 F. 2d 695, 697 (C. C. A. 4); *Todd* v. *United States*, 48 F. 2d 530, 532 (C. C. A. 5); *Cardinal* v. *United States*, 79 F. 2d 825, 826 (C. C. A. 6); *Wida* v. *United States*, 52 F. 2d 424 (C. C. A. 8); *Miller* v. *United States*, 9 F. 2d 382, 383 (C. C. A. 9); *Williams* v. *United States*, 66 F. 2d 868, 869 (C. C. A. 10).

[6] *Shew* v. *United States*, 155 F. 2d 628 (C. C. A. 4), cer-

Implicit in these decisions, we think, is the thought that prohibition or alcohol tax unit agents are, at the very least, peace officers of the United States, for the purpose of enforcing the laws relating to liquor. The decisions recognize their right to search and seize as well as to arrest, and it is, we think, doubtful whether the right to search and seize would pertain to private citizens making an arrest. See also, *Steele* v. *United States No. 2*, 267 U. S. 505, 509, where this Court held that prohibition agents were authorized to execute search warrants under the Espionage Act, and *Maryland* v. *Soper* (*No. 1*), 270 U. S. 9, where this Court held that prohibition agents were revenue agents within the provisions of Section 33 of the Judicial Code, conferring the right to have a state prosecution for an offense committed in the course of duty removed to a federal court for trial.

Congress also has treated agents of the Alcohol Tax Unit as peace officers in Section 201 of the Liquor Repeal and Enforcement Act of 1935 (18 U. S. C. 53a), for, when reenacting the provision of the prohibition act making it a penal offense for an officer to search a dwelling house without a warrant, it added the proviso—

Provided, That nothing herein contained

---

tiorari denied, 328 U. S. 870; *United States* v. *Feldman*, 104 F. 2d 255 (C. C. A. 3), certiorari denied, 308 U. S. 579; *Crabb* v. *United States*, 99 F. 2d 325, 327 (C. C. A. 10); *Papani* v. *United States*, 84 F. 2d 160, 162 (C. C. A. 9).

> shall apply to any officer, agent, or employee of the United States serving a warrant of arrest, or arresting or attempting to arrest any person committing or attempting to commit an offense in the presence of such officer, agent, or employee, or who has committed, or who is suspected on reasonable grounds of having committed, a felony.

The statute clearly assumes that the agents here involved have power to arrest, search and seize.

It is true that Section 3117 (a) of the Internal Revenue Code (Appendix *infra*, p. 51) lists the duties of the Commissioner and agents as investigating, reporting and obtaining warrants of arrest without mentioning the power to arrest without a warrant. That provision stems from Section 3 of the Liquor Repeal and Enforcement Acts (Appendix *infra*, p. 55) which reenacted the provisions of Section 2 of the National Prohibition Act (Appendix *infra*, p. 52). Yet, as we have shown, the power of agents to arrest without a warrant was assumed and recognized by the decisions of this Court and of the lower federal courts throughout the prohibition era.

It is to be noted that Section 2 of the Prohibition Act and its successors all provided that the provisions of R. S. 1014 (18 U. S. C. 591) should be deemed applicable in the enforcement of the laws relating to liquor. R. S. 1014, governing proceedings for arrest and admission to bail by United States Commissioners and state officers

"agreeable to the usual mode of process against offenders in such state," has been interpreted as rendering the state law of arrest without a warrant applicable to arrests for federal offenses. See *Cline* v. *United States*, 9 F. 2d 621 (C. C. A. 9). While the decisions of the prohibition era do not specify whether the power of agents to arrest without a warrant arises from this part of Section 2, or from the general powers of enforcement conferred by Section 28, they do make it clear that agents were deemed to have the power to arrest without a warrant. Congress therefore could not have meant to take away that power when it reenacted Sections 2 and 28 of the Prohibition Act as Sections 3 and 9 of the Liquor Repeal and Enforcement Act. On the contrary, as we have shown, Section 201 (a) of the Liquor Repeal and Enforcement Act clearly assumes that agents have the power to arrest without a warrant.

Therefore, if it should now be held that no federal statute governs the right to arrest for the offenses here involved by persons other than marshals, then the agents of the Alcohol Tax Unit would have the rights conferred on peace officers by state law in the state where the arrest is made. *United States* v. *Di Re*, 332 U. S. 581, 588–591. In New Jersey, where this arrest was made, the common law of arrest governs. *Delafoile* v. *State*, 54 N. J. L. 381, 383. As

set forth above, a law enforcement officer has the right at common law to arrest for a felony committed in his presence or on probable cause to believe that a felony has been committed, whether or not he has an opportunity to obtain a warrant for such arrest. Hence, under either federal or state law, the officers had authority to arrest petitioners without a warrant even though they could have obtained a warrant of arrest.[1]

There may be differences of opinion as to the wisdom of the common law policy in regard to arrests without a warrant and its statutory codification in regard to arrests for operation of illegal distilleries. Congress has itself indicated a different policy as to F. B. I. agents whom it has authorized to make arrests for felonies without warrants "where there is a likelihood of the person escaping before a warrant can be obtained for his arrest." Act of June 18, 1934, c.

[1] The general state law of arrest, rather than a state statute governing a particular state offense, would, of course, govern the power to arrest for the federal offenses here involved. Hence, Section 33: 2–3 of the New Jersey Revised Statutes, cited by petitioner (Br. 29–30), has no significance here, even though that statute relates to the same subject matter as the federal offenses for which the arrest was made. The inapplicability of the New Jersey statute in determining the power to arrest for the federal offenses is particularly apparent in this case because of the fact that possession of an illegal distillery is a misdemeanor under state law, whereas under federal law it is a felony. It is worth noting, moreover, that in providing for investigation "under proper search warrant when necessary," the New Jersey statute recognizes that a search warrant is not necessary in all cases.

595, 48 Stat. 1008; Act of March 22, 1935, c. 39, 49 Stat. 77, 5 U. S. C. 300a. The older policy has been left in force as to illegal distilleries, whether 18 U. S. C. 593 governs, or whether the agents are relegated to their right of arrest under state law. That policy may be a mere accident of history, or it may represent a deliberate decision based on the fact that, in this type of offense, the identification of the offenders is seldom as explicit as it was in this case. The more usual pattern is for agents to receive, through their senses or through other sources of information, knowledge merely that an illegal still is being operated without precise knowledge of the identity of the principal offenders. The normal procedure is to watch for a time when it seems likely that the principal offenders, and not merely some unimportant workman, will be at the still, and thus identify and arrest the principal violators. Even in this case, it seems evident that the still was allowed to operate as long as it was in the hope of obtaining further information as to other members of the ring. And it is significant that, with all the sources of information available to the Government in this case, the raid on the night of June 3 resulted in the apprehension of an offender not previously known to the government undercover agent. See Statement, *supra*, p. 6. This may appear to be an argument of convenience but, even on that footing, it is an argument of convenience which has

the force of centuries of common law history behind it.

In any event, whatever one's individual judgment as to the desirability or undesirability of allowing law enforcement officers to make an arrest without a warrant when there is time to get a warrant, it is clear that a right which has been recognized as constitutional at the time of and since the adoption of the Fourth Amendment, cannot now be deemed in violation of that Amendment. If changes are to be made, it is for the legislature and not the courts to make them.

B. *Since the arrest was lawful, the seizure of contraband open to view at the time of arrest was also lawful.*—Since, as we have shown, the arrest of petitioners without warrants of arrest was lawful, it follows as a matter of course that the officers had the right, at the time of arrest at the place where the offense was being committed, to seize articles open to view, which not only constituted the instrumentalities of the crimes for which the arrest was made, but were articles of contraband in which, by statute (26 U. S. C. 3116), petitioners could have no property right whatsoever.

As pointed out above, there is no occasion in this case to reexamine the question decided by this Court in *Harris* v. *United States*, 331 U. S. 145, as to the permissible extent of a search incident to a lawful arrest. We have here a case, not of search, but of seizure of contraband open to view, contraband which constituted the means of com-

mitting the very crime for which the arrest was made. The right to seize this type of property at the time an arrest is made, without a search warrant, is established not only by the consistent practice which we detailed in our brief in the *Harris* case, but by a long, unbroken line of reported decisions in state, federal and English courts.

In one of the earliest reported cases dealing with search and seizure, *Banks* v. *Farwell,* 21 Pick. 156, decided by the Supreme Judicial Court of Massachusetts in 1839, when writs of assistance could still be recalled by living men, the court held that, where an accused, arrested outside his shop under a warrant of arrest for larceny, stated that the stolen property was in his shop, the arresting officer had the right to break into the premises without permission and take the stolen chattels. The action of the arresting officer was justified under a statute passed in 1804—very soon after the adoption of the Fourth Amendment—which made it the duty of the "officer who shall be lawfully employed in apprehending and arresting any person accused of the crime of larceny, to seize and secure the money, goods or other articles alleged to be stolen which shall be found in the possession of such accused person." The statute thus found to authorize the seizure without warrant was upheld against a claim that it violated the Massachusetts equivalent of the Fourth Amendment. The court said (21 Pick. at 159)—

It would be imputing to the law a dis-

> graceful degree of imbecility, to hold that it would not authorize the seizure of this property.

In *Houghton* v. *Bachman,* 47 Barb. (N. Y.) 388 (1866), the court upheld the taking of stolen property at the time of the arrest despite the fact that it found a warrant to search for the property to be invalid. In speaking of the power of the court to seize the fruits of crime open to view, the court said (47 Barb. at 392):

> The ends of justice demand that this power should exist, and the common law and its usages have sanctioned its exercise from time immemorial.[8]

In *Kneeland* v. *Connally,* 70 Ga. 424, 425 (1883), the court, in upholding the seizure of gaming equipment at the time of arrest of the offender said:

> * * * * The warrant to seize the keeper of the unlawful house or room carries with it the power or legal authority to seize the implements of his crime, just as a warrant to arrest a man charged with murder would carry with it authority to seize the bloody knife or smoking pistol which killed; or a warrant to arrest a counterfeiter would include the legal seizure of his tools for counterfeiting. No separate warrant is necessary in either case.

---

[8] New York did not at the time have a constitutional provision similar to the Fourth Amendment but it did embody the same provisions in a statute. New York Revised Statutes (1829) V. 1, c. IV, sec. 11.

In *State* v. *Robbins,* 124 Ind. 308, 311 (1890), the court expressed the view that gaming equipment was properly seized without warrant at the time of the arrest of the offender even though a state statute authorized the issuance of a search warrant for such property. The court there said:

> If, without resorting to the statute, the proper officer of the court obtained possession of the articles, or things, used in the commission of a crime, in some other manner equally lawful and legitimate, the jurisdiction of the court over the subject would be the same as if it had been first taken by a search warrant, and turned over to the sheriff. In other words, so far as the court has jurisdiction over the property or thing, its jurisdiction depends upon the fact that the apparatus shall be properly in the custody of the sheriff, when the offender is before the court for trial, and not that he shall have obtained the custody by means of a search warrant. * * *

The English authorities are to the same effect. *Dillon* v. *O'Brien,* 20 L. R. Ir. 300, 314, 16 Cox C. C. 245 (1887); *Tyler and Witt* v. *London and S. W. R. Co.,* Cab. & El. 285, 286 (1884); *Elias* v. *Pasmore,* [1934] 2 K. B. 164.

From the time that this Court first undertook to outlaw evidence seized as the result of an illegal search, it has recognized that a warrant is not required to seize instrumentalities of the crime open to view at the time an arrest was made.

Thus, in *Weeks* v. *United States*, 232 U. S. 383, 392, this Court recognized the right to search for instrumentalities of the crime, as a separate, well-established category, independent of the right to search the person, saying that the case before it was not "the case of burglar's tools or other proofs of guilt found upon his arrest within the control of the accused."

In *Carroll* v. *United States*, 267 U. S. 132, 158, holding that a warrant was not necessary to justify the search of a moving vehicle, the Court said:

> When a man is legally arrested for an offense, whatever is found upon his person or in his control which is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.

In *Agnello* v. *United States*, 269 U. S. 20, 30, this Court, in eliminating from the case the question of the validity of the search and seizure at the place where the defendant was arrested, said:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.

> See *Carroll* v. *United States*, 267 U. S. 132, 158; *Weeks* v. *United States*, 232 U. S. 383, 392. The legality of the arrests or of the searches and seizures made at the home of Alba is not questioned. Such searches and seizures naturally and usually appertain to and attend such arrests. * * *

In *United States* v. *Lee*, 274 U. S. 559, 563, in upholding the search of a motorboat and the seizure of liquor found therein, this Court gave as an alternative reason for upholding the search and seizure the fact that the search, if any, was made "as an incident of a lawful arrest."

In *Marron* v. *United States*, 275 U. S. 192, 198–199, in upholding as incident to a lawful arrest the seizure of documents not in themselves contraband, not mentioned in a search warrant, this Court said:

> * * * The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise. * * *

In *Go-Bart Co.* v. *United States*, 282 U. S. 344, 358, in distinguishing the case before it from the *Marron* case, this Court said:

> Plainly the case before us is essentially different from *Marron* v. *United States*, 275 U. S. 192. There, officers executing a

valid search warrant for intoxicating liquors found and arrested one Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon. As an incident to the arrest they seized a ledger in a closet where the liquor or some of it was kept and some bills beside the cash register. These things were visible and accessible and in the offender's immediate custody. There was no threat of force or general search or rummaging of the place.

Similarly in *Lefkowitz* v. *United States*, 285 U. S. 452, 465, this Court said:

> These searches and seizures are to be distinguished from the seizure of a ledger and some bills that was sustained in the *Marron* case. There, prohibition officers lawfully on the premises searching for liquor described in a search warrant, arrested the bartender for crime openly being committed in their presence. He was maintaining a nuisance in violation of the Act. The offense involved the element of continuity, the purchase of liquor from time to time, its sale as a regular thing for consumption upon the premises and other transactions including the keeping of accounts. The ledger and bills being in plain view were picked up by the officers as an incident of the arrest. No search for them was made. The ledger was held to be part of the outfit actually used to commit the offense. The bills were deemed so closely related to the business that it was not un-

> reasonable to consider them as employed to carry it on. While no use was being made of the book or papers at the moment of the arrest, they—like containers, chairs and tables for customers, the cash register, glasses and supplies were kept to be utilized when needed. The facts disclosed in the opinion were held to justify the inference that when the arrest was made the ledger and bills were in use to carry on the criminal enterprise.

In its recent decision on the subject, *Harris* v. *United States*, 331 U. S. 145, 150–151,[9] this Court said:

> * * * Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states.

The dissenting opinion of Mr. Justice Frankfurter in that case recognizes the difference between a search incident to a legal arrest and the situation in which contraband "in plain view" is "picked up by the officers as an incident to the arrest" (331 U. S. at 169), and the dissenting opinion of Mr. Justice Murphy explains the prior decisions of this Court, discussed above, as follows (331 U. S. at 186):

> It is undoubtedly true that limited seizures may be made without the benefit

[9] In *Johnson* v. *United States*, No. 329, this Term, decided Feb. 2, 1948, the arrest was held to be unlawful.

> of search warrants under certain circumstances where a person has been arrested in his home. Due accommodation must be made for the necessary processes of law enforcement. Seizure may be made of articles and papers on the person of the one arrested. And the arresting officer is free to look around and seize those fruits and evidences of crime which are in plain sight and in his immediate and discernible presence. * * *

In the type of situation here involved, where the property seized incident to the arrest is contraband in the true sense and is open to view at the time of arrest, the arrest is significant only to the extent that it legalizes the entry of the officers into the premises. Cf. *Johnson* v. *United States*, No. 329, this Term, decided Feb. 2, 1948. The right of the officers to seize does not depend on the right to arrest. The right to seize arises from the fact that, in a place where they have lawfully entered, they see before their eyes property the very possession of which is a crime. Time and again, the Internal Revenue Code declares that the type of property here involved is property which cannot lawfully be possessed. For example, Section 3116 of the Internal Revenue Code provides:

> It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations pre-

scribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. * * *

See also Sections 2810, 2814 and 2833 of the Internal Revenue Code, Appendix, *infra*, pp. 47–50.

Experienced agents would have no difficulty in ascertaining at a glance that the distillery here involved was property forfeit under all those provisions of the Internal Revenue Code. The shed in which the still was housed very obviously failed to comply with the regulations governing specifications for the construction of distillery buildings (26 C. F. R. Cum. Supp., c. I, Sec. 183.10–183.29). The shed obviously carried no sign reading "Registered Distillery" as required by Section 2831 of the Internal Revenue Code. Thus, when the agents came into the shed to make the arrest—an entry which, as we have shown, they could lawfully make without a warrant—they found before them apparatus which by law was forfeit to the United States, apparatus in which petitioners neither had nor could have any property right whatsoever. It was their duty as well as their right to take possession of that property.

This Court has always recognized that where, in the course of his lawful duties, an officer has come upon property which is contraband in the true sense, the officer may seize the property without a warrant. *Harris* v. *United States*, 331 U. S. 145; *Steele* v. *United States No. 1*, 267 U. S. 498;

see *Adams* v. *New York*, 192 U. S. 585, 598; *Zap* v. *United States*, 328 U. S. 624.

It was on this theory that the seizure of the draft cards, turned up in the course of a lawful search, was upheld in the *Harris* case although the agents were not searching for draft cards. In *Steele* v. *United States No. 1*, 267 U. S. 498, a search warrant authorized search of the premises for a number of cases believed to contain whiskey. Search disclosed, and the agents seized, not only 150 cases of whiskey, but also 92 kegs of whiskey, a 5-gallon can of alcohol, 66 cases of gin, six 5-gallon jugs of whiskey, 102 quarts of whiskey, two 50-gallon barrels of whiskey, and a corking machine. This Court held that the property was lawfully seized, and affirmed a decree holding that it should not be returned.[10]

Lower federal courts have consistently followed the same rule. *Bennett* v. *United States*, 145 F. 2d 270 (C. C. A. 4), certiorari denied, 323 U. S. 788 (search warrant for counterfeiting apparatus justifies seizure of counterfeit ration coupons); *In re 14 East 17th Street*, 65 F. 2d 289 (C. C. A. 2) (smuggled goods discovered after entry by consent); *Paper* v. *United States*, 53 F. 2d 184 (C. C. A. 4) (liquor found during search for

[10] *Marron* v. *United States*, 275 U. S. 192, 196, holding that a ledger, etc., could not lawfully be seized under a search warrant because not mentioned therein, is not to the contrary, since the articles there involved were not in themselves contraband.

defendant whose arrest was sought on a bench warrant); *United States* v. *Two Soaking Units, Etc.*, 48 F. 2d 107 (C. C. A. 2), certiorari denied, 284 U. S. 627 (contraband discovered during lawful inspection); *Hilsinger* v. *United States*, 2 F. 2d 241 (C. C. A. 6), certiorari denied, 266 U. S. 622 (same); *United States* v. *Jankowski*, 28 F. 2d 800 (C. C. A. 2) (liquor found in car being stopped to notify driver to fix headlights); *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736 (C. C. A. 2) (seizure of 4867½ cases of various kinds of intoxicating liquor held proper under search warrant for 10 or 12 barrels of intoxicating liquor); *Milam* v. *United States*, 296 Fed. 629 (C. C. A. 4), certiorari denied, 265 U. S. 586 (aliens unlawfully in U. S. discovered in truck stopped on reasonable belief it was carrying liquor); *United States* v. *Charles*, 8 F. 2d 302 (N. D. Calif.) (liquor seized in course of search for narcotics); *United States* v. *Seltzer*, 5 F. 2d 364 (D. Mass.) (counterfeit bond strip label stamps seized in search for liquor); *United States* v. *Camarota*, 278 Fed. 388 (S. D. Calif.) (still seized in search for liquor).

It is, of course, true that Section 3116 of the Internal Revenue Code, after declaring unlawful the possession of liquor or property intended for use in the violation of the revenue laws, provides for seizure of such property under a warrant (Appendix, *infra*, pp. 50–51). That section, however, applies only when the entry must be made to

seize; it has never been interpreted as requiring a warrant where, after a lawful entry for another purpose, the contraband property is before the eyes of the enforcing officers, or where possession of the property is obtained by some means other than a warrant. Section 3116 of the Internal Revenue Code had its origin in Section 25 of the National Prohibition Act (41 Stat. 315, Appendix, *infra*, p. 53), which contained a similar provision outlawing property rights in liquor or property used in the manufacture of liquor and providing for the seizure of such property by search warrant. Yet, as we have shown, this Court in the *Steele* case, recognized that agents could properly take contraband not described in the warrant which they were executing. Throughout the prohibition era, the circuit courts of appeal consistently held admissible in evidence contraband liquor or contraband apparatus seized pursuant to a lawful arrest. *Vachina* v. *United States*, 283 Fed. 35, 36 (C. C. A. 9); *McBride* v. *United States*, 284 Fed. 416 (C. C. A. 5), certiorari denied, 261 U. S. 614; *Sayers* v. *United States*, 2 F. 2d 146, 147 (C. C. A. 9); *Miller* v. *United States*, 9 F. 2d 382, 383 (C. C. A. 9); *Benton* v. *United States*, 28 F. 2d 695, 697 (C. C. A. 4); *Samson* v. *United States*, 26 F. 2d 769, 770 (C. C. A. 1); *Smallwood* v. *United States*, 68 F. 2d 244, 246 (C. C. A. 5); *Crace* v. *United States*, 44 F. 2d 894, 895 (App. D. C.); *Todd* v. *United States*, 48 F. 2d 530, 532 (C. C. A. 5); *Vecchio* v. *United States*, 53 F. 2d

628, 631 (C. C. A. 8); *Cardinal* v. *United States*, 79 F. 2d 825, 826 (C. C. A. 6); *McShann* v. *United States*, 67 F. 2d 655, 656 (C. C. A. 10). This right to seize incident to an arrest was upheld even where the arrest was made in a private dwelling. *Wida* v. *United States*, 52 F. 2d 424 (C. C. A. 8). The courts also upheld seizure of liquor after entry was made for a purpose other than arrest, or where possession was lawfully obtained by some means other than a warrant. *Dillon* v. *United States*, 279 Fed. 639, 647 (C. C. A. 2); *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736, 738 (C. C. A. 2); *Avignone* v. *United States*, 12 F. 2d 509 (C. C. A. 2); *The Ng Ka Py Cases*, 24 F. 2d 772 (C. C. A. 9); *Carvalho* v. *United States*, 54 F. 2d 232, 233 (C. C. A. 1); *United States* v. *135,019 Gallons, More or Less, of Wine*, 56 F. 2d 1064 (D. C. N. D. Calif.); *O'Connor* v. *United States*, 281 Fed. 396 (D. N. J.).

In view of this consistent interpretation of the seizure provision of Section 25 of the National Prohibition Act, it cannot be said that Congress intended a different rule to apply when it in substance enacted the provisions of Section 25 as Section 8 of the Liquor Repeal and Enforcement Act of 1935. To the contrary, the proviso of Section 201 of the 1935 Act referred to, *supra*, pp. 19–20, shows clearly that, in the Liquor Repeal and Enforcement Act, Congress contemplated seizures incident to a lawful arrest as something separate and apart from seizures under Section 8.

The right of seizure incident to a lawful arrest without resort to a warrant under Section 8 of the 1935 Act has been recognized and upheld since the repeal of prohibition. As noted above, it was recognized by this Court in *Scher* v. *United States*, 305 U. S. 251, where liquor was found in a moving vehicle which had come to rest in a garage. Decisions in lower federal courts have similarly upheld the right of seizure incident to an arrest where moving vehicles were not involved. *Crabb* v. *United States*, 99 Fed. 325, 327 (C. C. A. 10); *United States* v. *Feldman*, 104 F. 2d 255 (C. C. A. 3), certiorari denied, 308 U. S. 579; *Shew* v. *United States*, 15 F. 2d 628, 630 (C. C. A. 4), certiorari denied, 328 U. S. 870.

Any other construction would indeed transform into a technicality a principle which was designed to protect a fundamental right. After all, the underlying purpose of requiring a search warrant was to make sure that the privacy of home or office would not be invaded except on probable cause to believe that articles subject to seizure were contained therein. But once that privacy has been lawfully invaded, once the entry has been lawfully made, no rights would be vindicated by requiring law enforcement officers to disregard objects which are there before their eyes. The entry, the breach of the castle wall, has already occurred; the illegal objects in which a defendant has no property right have already been

uncovered. What advantage would there be in requiring a warrant in such a situation? Assuming that, in this case, a warrant should be held necessary to justify the seizure, but not the entry, and that the still, vats, and cans seized could properly be suppressed as evidence, what would petitioners gain? They have no property right in the articles, and therefore no right to have them returned. See Rule 41 (e), F. R. Crim. P., providing for the restoration of property illegally seized "unless otherwise subject to lawful detention." They might, under the rule, have the physical exhibits suppressed as evidence and thus prevent their production in court. But if the arrest is legal there is no reason why, even if the evidence should be suppressed, the agents could not testify to what they saw at the time of the valid arrest. The subsequent illegal seizure, assuming it was such, would not invalidate a previous valid arrest. See *Zap* v. *United States,* 328 U. S. 624, 629; *United States* v. *Lee,* 274 U. S. 559, 563; *McGuire* v. *United States,* 273 U. S. 95. For in this type of situation, where there is a seizure of property open to view at the time the arrest is made, the advantage of a warrant—i. e., the substitution of the judgment of a judicial officer as to the existence of probable cause for the judgment of a law enforcement officer—goes only to the arrest, and not to the seizure. And as to the arrest, as we have shown, the whole course of

historical development makes it clear that the decision whether or not to require a warrant is for the legislature and not for the courts.

A holding that contraband open to view at the time of arrest may be seized at the time of the arrest, whether or not the property could have been obtained in another way by means of a search warrant, does not, as has been intimated, render search warrants superfluous. Search warrants continue to be necessary for the purpose which they have historically always served—the purpose of searching for illegal articles to be seized without arrest, such as smuggled goods, or to be used as evidence upon which an arrest can then be made. See the discussion in 2 Hale, *Pleas of the Crown* 114, regarding search warrants for stolen property: "4. But because the having of stolen goods in his custody is *prima facie* an evidence of a felony and a good cause of suspicion, it is a lawful clause in the warrant to attach the party, in whose custody they are found * * *." After all, when it was questioned whether warrants should be issued, even to recover stolen property (see *Entick* v. *Carrington,* 19 How. St. Tr. 1029, 1067), it is unlikely that there was any idea that, after an offender had been apprehended and the stolen property identified in his possession, the government or the owner would have to resort to an action in replevin to get back the property. And in the years when statutes authorizing the issuance of search warrants were limited to certain

specified objects,"[11] it was, as the cases cited above indicate, neither the practice nor the theory that instrumentalities of the crime for which an arrest was made, such as a gun, were immune from seizure because not mentioned in the specific statutes permitting issuance of search warrants, or because warrants for goods mentioned in such statutes were not issued before the arrest. As this Court in effect held in the *Harris* case, the right of search incident to a lawful arrest has historically always been a right outside the field of law relating to search warrants as such. And certainly the right to seize contraband open to view at the time of arrest even more clearly falls outside the field of search warrant law.

In general, it may be said that a search warrant continues to be necessary, either before or after arrest, when the entry, the breach of privacy, is made for the purpose of search or seizure. If entry is made to search after an arrest in a place other than that where the arrest takes place, a warrant is necessary. *Agnello* v. *United States,* 269 U. S. 20. If entry is made to search or seize without an arrest, a warrant is necessary. *Taylor* v. *United States,* 286 U. S. 1; *Johnson* v. *United States,* No. 329, this Term, decided Feb. 2, 1948.

[11] E. g., Mass. Rev. Stat. (1836), c. 142, secs. 1–2; 3 N. Y. Rev. Stat. (1859), p. 1040. See federal statutes listed by Frankfurter, J., dissenting in *Davis* v. *United States,* 328 U. S. 582, at 616–623.

It is in such situations, where the entry is made for the purpose of search or seizure, that time to obtain a warrant becomes of the essence. Where the warrant is the means of establishing legal entry, the key to unlock the doors of privacy, this Court has held that a warrant, the key, must be obtained when time to obtain one exists. Thus, in *Taylor* v. *United States,* 286 U. S. 1, where agents entered a garage, not to arrest, but to seize, this Court held that the entry and the subsequent seizure were illegal because the agents had ample time to obtain a warrant. *Accord: Johnson* v. *United States,* No. 329, this Term, *supra.* But in the *Taylor* case, there was no basis for entry other than the desire to search and seize, and this Court specifically said that it was unnecessary to discuss "the rule in respect of searches in connection with an arrest" (286 U. S. at p. 6). In the *Johnson* case, this Court held that the officers did not have sufficient information to justify an arrest before they entered the premises, so that this Court found that the entry was made to search, rather than to arrest.

In *Carroll* v. *United States,* 267 U. S. 132, on the other hand, even though there was no right to arrest, this Court held that a search without a warrant was justified, and that the evidence uncovered by the search warrant could form the basis of a subsequent arrest because, in the case

of a moving vehicle, it would be impracticable to obtain a search warrant. While, in part, that decision was based on the specific provisions of Section 26 of the National Prohibition Act, the opinion of the court makes it clear that the statute was found to be constitutional because of its inherent reasonableness. As pointed out above, the principle of the *Carroll* case was applied by this Court in the *Scher* case, 305 U. S. 251, after the repeal of Section 26 of the National Prohibition Act.

In *Go-Bart Co.* v. *United States,* 282 U. S. 344, 358, this Court mentioned, as one of the factors rendering the search in that case unreasonable, the fact that agents had opportunity to obtain a warrant. But the whole basis of that decision was the fact that the arrest in that case was merely a pretext for an invalid search for evidence, so that the entry was primarily for the purpose of search, and not for the purpose of arrest. The Court specifically pointed out that no crime was being committed at the time the arrest was made. 282 U. S. at 357.

None of the cases in this Court which discuss the question of time to obtain a search warrant touch the situation where entry is lawfully made for some other purpose and where, after lawful entry,[12] the contraband property is found in open

[12] The Second Circuit cases on which petitioner relies (Br. 24–25) also involve situations where the entry was made to

view. On the contrary, as we pointed out, *supra*, p. 34, this Court in the *Steele* case, 267 U. S. 498, specifically recognized that contraband uncovered in a search under a warrant could be seized after entry under the warrant, and in the *Marron* case, 275 U. S. 192, it held that instrumentalities of the crime, not in themselves contraband, could be seized, although not mentioned in the warrant, where entry had been made under the warrant and a lawful arrest effected. In other words, both those cases hold definitely, in accordance with well established law, that where an entry is lawfully made, a warrant is not necessary to justify the seizure of contraband or instrumentalities of the crime.

The time to obtain a warrant loses all significance where the warrant does not serve the function of a key justifying entry, particularly where, as here, there is no search, but merely sei-

---

search and not for some other lawful purpose. In *United States* v. *Kaplan*, 89 F. 2d 869, the court found that the officers did not have sufficient probable cause for the arrest on which the search was based. In *United States* v. *Edelson*, 83 F. 2d 404, there was no arrest, and in *In re Milburne*, 77 F. 2d 310, the search preceded the arrest. The Second Circuit has in fact very clearly articulated the principle referred to above, that contraband may be seized without a warrant when discovered after a lawful entry for another purpose. *In re 14 East 17th Street*, 65 F. 2d 289; *United States* v. *Two Soaking Units*, 48 F. 2d 107, certiorari denied, 284 U. S. 627; *United States* v. *Old Dominion Warehouse*, 10 F. 2d 736.

zure of articles in which defendants have no property right. The time to obtain a warrant loses all significance because the warrant itself has, as we have shown, no function to serve in such a situation. In that kind of situation, the factor of opportunity to obtain a warrant goes to the reasonableness of the arrest and not of the seizure, and the reasonableness of arrest without a warrant is a matter for legislative, not judicial judgment.[13]

CONCLUSION

Since, historically and by statute, an arrest without a warrant may be made even though time exists to obtain a warrant, contraband open to view at the time of the arrest may properly be seized without a warrant, although there is time for the arresting officers to obtain a search war-

[13] In their brief petitioners for the first time raise the contention that Nilsen's act in abstracting samples of each run of alcohol and other articles while he was working for petitioners in an undercover capacity constituted an illegal search and that the district court should have directed the return of such property (Br. 32–33). That question is not before this Court. While petitioners' notice of a petition to suppress evidence referred to "all papers, records and documents and other property seized by the Government" (R. 2), the petition to suppress itself referred only to the property seized on the night of June 3 (R. 3). The district judge's opinion (R. 103–106) shows that he considered that the only question before him was the legality of the seizure on the night of June 3.

rant. We therefore respectfully submit that the judgment below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.
T. VINCENT QUINN,
Assistant Attorney General.
ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

FEBRUARY 1948.

APPENDIX

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The pertinent provisions of the Internal Revenue Code (26 U. S. C.) are:

> § 2810. (a) Requirement. Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register the same with the collector of the district in which it is, by subscribing and filing with him duplicate statements, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used; one of which statements shall be retained and preserved by the collector, and the other transmitted by him to the Commissioner. Stills and distilling apparatus shall be registered immediately upon their being set up.
>
> Every still or distilling apparatus not so registered, together with all personal property in the possession or custody, or under

the control of such person, and found in the building, or in any yard or inclosure connected with the building in which the same may be set up, shall be forfeited.

And every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not so registered, shall pay a penalty of $500, and shall be fined not less than $100, nor more than $1,000, and imprisoned for not less than one month, nor more than two years.

* * * * *

§ 2814. Every person intending to commence or to continue the business of a distiller shall, on filing with the collector his notice of such intention, and before proceeding with such business, and on the 1st day of May of each succeeding year, execute a bond in the form prescribed by the Commissioner, * * *

* * * * *

Every person who fails or refuses to give the bond hereinbefore required, or to renew the same, or who gives any false, forged, or fraudulent bond, shall forfeit the distillery, distilling apparatus, and all real estate and premises connected therewith, and shall be fined not less than $500 nor more than $5,000, and imprisoned not less than six months nor more than two years.

* * * * *

§ 2831. Every person engaged in distilling or rectifying spirits, and every wholesale liquor dealer, shall place and keep conspicuously on the outside of the place of such business a sign, exhibiting in plain and legible letters, not less than three

inches in length, painted in oil-colors or gilded, and of a proper and proportionate width, the name or firm of the distiller, rectifier, or wholesale dealer, with the words: "Registered distillery," "rectifier of spirits," or "wholesale liquor dealer," as the case may be. Every person who violates the foregoing provision by negligence or refusal, or otherwise, shall pay a penalty of $500.

* * * * *

§ 2833. Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $100 nor more than $5,000 and imprisoned for not less than thirty days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or

suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

* * * * *

§ 2834. No mash, wort, or wash, fit for distillation or for the production of spirits or alcohol, shall be made or fermented in any building or on any premises other than a distillery duly authorized according to law; * * *. Every person who violates any provision of this section shall be fined for each offense not less than $500 nor more than $5,000, and be imprisoned not less than six months nor more than two years. * * *

* * * * *

§ 3116. It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this part, or the internal-revenue laws, or regulations prescribed under such part or laws, or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in title XI of the Act of June 15, 1917, 40 Stat. 228 (U. S. C., Title 18, §§ 611–633), for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and forfeiture of any liquor or prop-

erty under the provisions of this part, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws.

§ 3117. (a) The Commissioner, his assistants, agents, and inspectors, shall investigate and report violations of this part to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and the Commissioner, his assistants, agents, and inspectors, may swear out warrants before United States Commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes (U. S. C., Title 18, § 591) is hereby made applicable in the enforcement of this part. Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in title XI of the Act of June 15, 1917, 40 Stat. 228 (U. S. C., Title 18, §§ 611–633).

* * * * * * *

§ 3121. (a) The Commissioner, his assistants, agents, and inspectors, and all other

officers, employees, or agents of the United States, whose duty it is to enforce criminal laws, shall have all the rights, privileges, powers, and protection in the enforcement of the provisions of this part which are conferred by law for the enforcement of any laws in respect of the taxation, importation, exportation, transportation, manufacture, possession, or use of, or traffic in, intoxicating liquors.

The Act of March 1, 1879, c. 125, sec. 9, 20 Stat. 327 (18 U. S. C. 593) provides:

Where any marshal or deputy marshal of the United States within the district for which he shall be appointed shall find any person or persons in the act of operating an illicit distillery, it shall be lawful for such marshal or deputy marshal to arrest such person or persons, and take him or them forthwith before some judicial officer named in section one thousand and fourteen of the Revised Statutes, who may reside in the county of arrest or if none, in that nearest to the place of arrest, to be dealt with according to the provisions of sections ten hundred and fourteen, ten hundred and fifteen, ten hundred and sixteen of the said Revised Statutes.

The pertinent provisions of the National Prohibition Act of October 28, 1919, c. 85, Tit. II, 41 Stat. 307, *et seq.*, are as follows:

SEC. 2. The Commissioner of Internal Revenue, his assistants, agents, and inspectors shall investigate and report violations of this Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction

of the Attorney General, as in the case of other offenses against the laws of the United States; and such Commissioner of Internal Revenue, his assistants, agents, and inspectors may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this Act. Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in Title XI of the Act approved June 15, 1917 (Fortieth Statutes at Large, page 217, et seq.).

* * * * *

SEC. 25. It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in Title XI of public law numbered 24 of the Sixty-fifth Congress, approved June 15, 1917, and such liquor, the containers thereof, and such property so seized shall be subject to such disposition as the court may make thereof. If it is found that such liquor or property was so unlawfully held or possessed, or had been so unlawfully used, the liquor, and all property designed for the unlawful manufacture of liquor, shall be destroyed, unless the court shall otherwise order. No search warrant shall issue

to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house. The term "private dwelling" shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel, or boarding house. The property seized on any such warrant shall not be taken from the officer seizing the same on any writ of replevin or other like process.

SEC. 26. When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof.

* * * * * *

SEC. 28. The commissioner, his assistants, agents, and inspectors, and all other officers of the United States, whose duty it is to enforce criminal laws, shall have all the power and protection in the enforcement of this Act or any provisions thereof which is conferred by law for the enforcement of existing laws relating to the manufacture or sale of intoxicating liquors under the law of the United States.

The pertinent provisions of the Liquor Law Repeal and Enforcement Act of August 27, 1935, c. 740, 49 Stat. 872, are:

SEC. 3. The Commissioner, his assistants, agents, and inspectors, shall investigate and report violations of this title and of Title III of the National Prohibition Act to the United States attorney for the district in which committed, who is hereby charged with the duty of prosecuting the offenders, subject to the direction of the Attorney General, as in the case of other offenses against the laws of the United States; and the Commissioner, his assistants, agents, and inspectors, may swear out warrants before United States commissioners or other officers or courts authorized to issue the same for the apprehension of such offenders, and may, subject to the control of the said United States attorney, conduct the prosecution at the committing trial for the purpose of having the offenders held for the action of a grand jury. Section 1014 of the Revised Statutes is hereby made applicable in the enforcement of this title and of Title III of the National Prohibition Act. Officers mentioned in said section 1014 are authorized to issue search warrants under the limitations provided in title XI of the Act approved June 15, 1917 (40 Stat. 228; 18 U. S. C., secs. 611–633).

* * * * *

SEC. 8. It shall be unlawful to have or possess any liquor or property intended for use in violating the provisions of this title, or of Title III of the National Prohibition Act, or the internal-revenue laws, or regulations prescribed under such title or laws, or which has

been so used, and no property rights shall exist in any such liquor or property. A search warrant may issue as provided in title XI of the Act approved June 15, 1917 (40 Stat. 228; 18 U. S. C., secs. 611-633), for the seizure of such liquor or property. Nothing in this section shall in any manner limit or affect any criminal or forfeiture provision of the internal-revenue laws, or of any other law. The seizure and forfeiture of any liquor or property under the provisions of this title, or under the provisions of Title III of the National Prohibition Act, and the disposition of such liquor or property subsequent to seizure and forfeiture, or the disposition of the proceeds from the sale of such liquor or property, shall be in accordance with existing laws or those hereafter in existence relating to seizures, forfeitures, and disposition of property or proceeds, for violation of the internal-revenue laws.

SEC. 9. The Commissioner, his assistants, agents, and inspectors, and all other officers, employees, or agents of the United States, whose duty it is to enforce criminal laws, shall have all the rights, privileges, powers, and protection in the enforcement of the provisions of this title and of Title III of the National Prohibition Act, which are conferred by law for the enforcement of any laws in respect of the taxation, importation, exportation, transportation, manufacture, possession, or use of, or traffic in, intoxicating liquors.

* * * * * *

SEC. 201. Any officer, agent, or employee of the United States engaged in the enforcement of any law of the United States who shall search any private dwelling used and occupied as such dwelling without a

warrant directing such search, or who, while engaged in such enforcement, shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than $1,000, and for a subsequent offense not more than $1,000, or imprisoned not more than one year, or both such fine and imprisonment: *Provided,* That nothing herein contained shall apply to any officer, agent, or employee of the United States serving a warrant of arrest, or arresting or attempting to arrest any person committing or attempting to commit an offense in the presence of such officer, agent, or employee, or who has committed, or who is suspected on reasonable grounds of having committed, a felony.

U. S. GOVERNMENT PRINTING OFFICE: 1940

SUPREME COURT OF THE UNITED STATES

No. 427.—October Term, 1947.

Jack Trupiano, Romildo Riccardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., Petitioners, v. United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[June 14, 1948.]

Mr. Justice Murphy delivered the opinion of the Court.

This case adds another chapter to the body of law growing out of the Fourth Amendment to the Constitution of the United States. That Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In other words, the Fourth Amendment is a recognition of the fact that in this nation individual liberty depends in large part upon freedom from unreasonable intrusion by those in authority. It is the duty of this Court to give effect to that freedom.

In January, 1946, the petitioners sought to lease part of the Kell farm in Monmouth County, New Jersey, and to erect a building thereon. Kell suspected that they intended to build and operate an illegal still. He accordingly reported the matter to the appropriate federal authority, the Alcohol Tax Unit of the Bureau of Internal Revenue. The federal agents told Kell to accept the proposition, provided he did nothing to entice or encourage the petitioners into going ahead with their plans and

provided he kept the agents informed of all developments. Nilsen, one of the agents, was assigned in February to work on the farm in the disguise of a "dumb farm hand" and to accept work at the still if petitioners should offer it.

Toward the end of March, 1946, Kell agreed with petitioners to let them rent part of his farm for $300 a month. Kell and Nilsen assisted petitioners in the erection of the building, a roughly constructed barn about 200 yards from the Kell farmhouse. Nilsen also assisted in the erection of the still and the vats.

Operation of the still began about May 13, 1946. Nilsen thereafter worked as "mash man" at a salary of $100 a week, which he turned over to the Government. During this period he was in constant communication with his fellow agents. By prearrangement, he would meet one or more of the agents at various places within a few miles of the Kell farm; at these meetings "the conversation would be about the still building I had assisted in erecting or about the illicit distillery that I was working at on the Kell farm." On May 20 he met with one of his superior officers and gave him samples of alcohol, several sugar bags, a yeast wrapper and an empty five-gallon can which had been taken from the still premises.

On May 26 Nilsen received a two-way portable radio set from his superiors. He used this set to transmit frequent bulletins on the activities of the petitioners. On the basis of radio intelligence supplied by Nilsen, a truckload of alcohol was seized on May 31 about an hour after it had left the farm.

At about 9 p. m. in the evening of June 3, 1946, Nilsen radioed his superior that the still operators were awaiting the arrival of a load of sugar and that alcohol was to be taken from the farm when the sugar truck arrived. Nilsen apparently knew then that a raid was scheduled for that night, for he told Kell during the evening that "tonight is the night." He radioed at 11 p. m. that the

truck had been delayed but that petitioners Roett and Antoniole were at the still.

Three federal agents then drove to within three miles of the farm, at which point they were met by Kell. The remainder of the distance was traversed in Kell's automobile. They arrived at the farm at about 11:45 p. m. The agents stated that the odor of fermenting mash and the sound of a gasoline motor were noticeable as the car was driven onto the farm premises; the odor became stronger and the noise louder as they alighted from the car and approached the building containing the still. Van De Car, one of the agents, went around one end of the building. Looking through an open door into a dimly lighted interior he could see a still column, a boiler and a gasoline pump in operation. He also saw Antoniole bending down near the pump. He entered the building and placed Antoniole under arrest. Thereupon he "seized the illicit distillery."

After this arrest and seizure, Van De Car looked about further and observed a large number of five-gallon cans which he later found to contain alcohol and some vats which contained fermenting mash. Another agent, Casey, testified that he could see several of these cans through the open door before he entered; he subsequently counted the cans and found that there were 262 of them. After he entered he saw the remainder of the distillery equipment, including four large mash vats. The third agent, Gettel, proceeded to a small truck standing in the yard and "searched it thoroughly for papers and things of an evidentiary nature." It does not appear whether he was successful in his search or whether he took anything from the truck.

A few minutes later Roett was arrested outside the building. Petitioners Trupiano and Riccardelli apparently were arrested later that night by other agents, the place and the circumstances not being revealed by the

record before us. In addition, three other persons were arrested that night because of their connections with the illegal operations; one of them, who was unknown to Nilsen, was arrested when he arrived at the farm with a truck loaded with coke.

The agents engaged in this raid without securing a search warrant or warrants of arrest. It is undenied that they had more than adequate opportunity to obtain such warrants before the raid occurred, various federal judges and commissioners being readily available.

All of the persons arrested were charged with various violations of the Internal Revenue Code arising out of their ownership and operation of the distillery. Prior to the return of an indictment against them, the four petitioners filed in the District Court for the District of New Jersey a motion alleging that the federal agents had illegally seized "a still, alcohol, mash and other equipment," and asking that "all such evidence" be excluded and suppressed at any trial and that "all of the aforesaid property" be returned. The District Court denied the motion after a hearing, holding that the seizure was reasonable and hence constitutional. 70 F. Supp. 764. The Circuit Court of Appeals for the Third Circuit affirmed *per curiam* the order of the District Court. 163 F. 2d 828.

Thus we have a case where contraband property was seized by federal agents without a search warrant under circumstances where such a warrant could easily have been obtained. The Government, however, claims that the failure to secure the warrant has no effect upon the validity of the seizure. Reference is made to the well established right of law enforcement officers to arrest without a warrant for a felony committed in their presence, *Carroll* v. *United States*, 267 U. S. 132, 156–157, a right said to be unaffected by the fact that there may have been adequate time to procure a warrant of arrest. Since one of the petitioners, Antoniole, was arrested while engaged in operating an illegal still in the presence of

agents of the Alcohol Tax Unit, his arrest was valid under this view even though it occurred without the benefit of a warrant. And since this arrest was valid, the argument is made that the seizure of the contraband open to view at the time of the arrest was also lawful. Reliance is here placed on the long line of cases recognizing that an arresting officer may look around at the time of the arrest and seize those fruits and evidences of crime or those contraband articles which are in plain sight and in his immediate and discernible presence. *Weeks* v. *United States*, 232 U. S. 383, 392; *Carroll* v. *United States*, *supra*, 158; *Agnello* v. *United States*, 269 U. S. 20, 30; *United States* v. *Lee*, 274 U. S. 559, 563; *Marron* v. *United States*, 275 U. S. 192, 198–199; *Go-Bart Co.* v. *United States*, 282 U. S. 344, 358; *United States* v. *Lefkowitz*, 285 U. S. 452, 465; *Harris* v. *United States*, 331 U. S. 145, 150–151.

We sustain the Government's contention that the arrest of Antoniole was valid. The federal agents had more than adequate cause, based upon the information supplied by Nilsen, to suspect that Antoniole was engaged in felonious activities on the farm premises. Acting on that suspicion, the agents went to the farm and entered onto the premises with the consent of Kell, the owner. There Antoniole was seen through an open doorway by one of the agents to be operating an illegal still, an act felonious in nature. His arrest was therefore valid on the theory that he was committing a felony in the discernible presence of an agent of the Alcohol Tax Unit, a peace officer of the United States. The absence of a warrant of arrest, even though there was sufficient time to obtain one, does not destroy the validity of an arrest under these circumstances. Warrants of arrest are designed to meet the dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime. Those dangers, obviously, are not present where a felony plainly occurs before the eyes of an officer of the law at a place where he is lawfully present. Common sense then

dictates that an arrest in that situation is valid despite the failure to obtain a warrant of arrest.

But we cannot agree that the seizure of the contraband property was made in conformity with the requirements of the Fourth Amendment. It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable. *Carroll* v. *United States, supra,* 156; *Go-Bart Co.* v. *United States, supra,* 358; *Taylor* v. *United States,* 286 U. S. 1, 6; *Johnson* v. *United States,* 333 U. S. 10, 14–15. This rule rests upon the desirability of having magistrates rather than police officers determine when searches and seizures are permissible and what limitations should be placed upon such activities. *United States* v. *Lefkowitz, supra,* 464. In their understandable zeal to ferret out crime and in the excitement of the capture of a suspected person, officers are less likely to possess the detachment and neutrality with which the constitutional rights of the suspect must be viewed. To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial processes wherever possible. And subsequent history has confirmed the wisdom of that requirement.

The facts of this case do not measure up to the foregoing standard. The agents of the Alcohol Tax Unit knew every detail of the construction and operation of the illegal distillery long before the raid was made. One of them was assigned to work on the farm along with the illicit operator, making it possible for him to secure and report the minutest facts. In cooperation with the farm owner, who served as an informer, this agent was in a position to supply information which could easily have formed the basis for a detailed and effective search warrant. Concededly, there was an abundance of time

during which such a warrant could have been secured, even on the night of the raid after the odor and noise of the distillery confirmed their expectations. And the property was not of a type that could have been dismantled and removed before the agents had time to secure a warrant; especially is this so since one of them was on hand at all times to report and guard against such a move. See *United States* v. *Kaplan*, 89 F. 2d 869, 871.

What was said in *Johnson* v. *United States*, *supra*, 15, is equally applicable here: "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. . . . If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required."

And so when the agents of the Alcohol Tax Unit decided to dispense with a search warrant and to take matters into their own hands, they did precisely what the Fourth Amendment was designed to outlaw. Uninhibited by any limitations that might have been contained in a warrant, they descended upon the distillery in a midnight raid. Nothing circumscribed their activities on that raid except their own good senses, which the authors of the Amendment deemed insufficient to justify a search or seizure except in exceptional circumstances not here present. The limitless possibilities afforded by the absence of a warrant were epitomized by the one agent who admitted searching "thoroughly" a small truck parked in the farmyard for items of an evidentiary character. The fact that they actually seized only contraband property, which would doubtless have been described in a warrant had one been issued, does not detract from the

illegality of the seizure. See *Amos* v. *United States*, 255 U. S. 313; *Byars* v. *United States*, 273 U. S. 28; *Taylor* v. *United States*, *supra*.

Moreover, the proximity of the contraband property to the person of Antoniole at the moment of his arrest was a fortuitous circumstance which was inadequate to legalize the seizure. As we have seen, the existence of this property and the desirability of seizing it were known to the agents long before the seizure and formed one of the main purposes of the raid. Likewise, the arrest of Antoniole and the other petitioners in connection with the illicit operations was a foreseeable event motivating the raid. But the precise location of the petitioners at the time of their arrest had no relation to the foreseeability or necessity of the seizure. The practicability of obtaining a search warrant did not turn upon whether Antoniole and the others were within the distillery building when arrested or upon whether they were then engaged in operating the illicit equipment. Antoniole just happened to be working amid the contraband surroundings at 11:45 p. m. on the night in question, while the other three petitioners chanced to be some place else. But Antoniole might well have been outside the building at that particular time. If that had been the case and he had been arrested in the farmyard, the entire argument advanced by the Government in support of the seizure without warrant would collapse. We do not believe that the applicability of the Fourth Amendment to the facts of this case depends upon such a fortuitous factor as the precise location of Antoniole at the time of the raid.

In other words, the presence or absence of an arrestee at the exact time and place of a foreseeable and anticipated seizure does not determine the validity of that seizure if it occurs without a warrant. Rather the test is the apparent need for summary seizure, a test which clearly is not satisfied by the facts before us.

A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity that merely a lawful arrest. The mere fact that there is a valid arrest does not *ipso facto* legalize a search or seizure without a warrant. *Carroll* v. *United States, supra,* 158. Otherwise the exception swallows the general principle, making a search warrant completely unnecessary wherever there is a lawful arrest. And so there must be some other factor in the situation that would make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant. In the case before us, however, no reason whatever has been shown why the arresting officers could not have armed themselves during all the weeks of their surveillance of the locus with a duly obtained search warrant—no reason, that is, except indifference to the legal process for search and seizure which the Constitution contemplated.

We do not take occasion here to reexamine the situation involved in *Harris* v. *United States, supra.* The instant case relates only to the seizure of contraband the existence and precise nature and location of which the law enforcement officers were aware long before making the lawful arrest. That circumstance was wholly lacking in the *Harris* case, which was concerned with the permissible scope of a general search without a warrant as an incident to a lawful arrest. Moreover, the *Harris* case dealt with the seizure of Government property which could not have been the subject of a prior search warrant, it having been found unexpectedly during the course of a search. In contrast, the contraband seized in this case could easily have been specified in a prior search warrant. These factual differences may or may not be of significance so far as general principles are concerned. But the differences

are enough to justify confining ourselves to the precise facts of this case, leaving it to another day to test the *Harris* situation by the rule that search warrants are to be obtained and used wherever reasonably practicable.

What we have here is a set of facts governed by a principle indistinguishable from that recognized and applied in *Taylor* v. *United States, supra.* The Court there held that the seizure of illicit whiskey was unreasonable, however well-grounded the suspicions of the federal agents, where there was an abundant opportunity to obtain a search warrant and to proceed in an orderly, judicial way. True, the *Taylor* case did not involve a seizure in connection with an arrest. And the officers there made an unlawful entry onto the premises. But those factors had no relation to the practicability of obtaining a search warrant before making the seizure. It was the time element and the foreseeability of the need for a search and seizure that made the warrant essential. The *Taylor* case accordingly makes plain the illegality of the seizure in the instant proceeding.

The Fourth Amendment was designed to protect both the innocent and the guilty from unreasonable intrusions upon their right of privacy while leaving adequate room for the necessary processes of law enforcement. The people of the United States insisted on writing the Fourth Amendment into the Constitution because sad experience had taught them that the right to search and seize should not be left to the mere discretion of the police, but should as a matter of principle be subjected to the requirement of previous judicial sanction wherever possible. The effective operation of government, however, could hardly be embarrassed by the requirement that arresting officers who have three months within which to secure the authorization of judicial authority for making search and seizure should secure such authority and not be left to their own discretion as to what is

to be searched and what is to be seized. Such a requirement partakes of the very essence of the orderly and effective administration of the law.

It is a mistake to assume that a search warrant in these circumstances would contribute nothing to the preservation of the rights protected by the Fourth Amendment. A search warrant must describe with particularity the place to be searched and the things to be seized. Without such a warrant, however, officers are free to determine for themselves the extent of their search and the precise objects to be seized. This is no small difference. It is a difference upon which depends much of the potency of the right of privacy. And it is a difference that must be preserved even where contraband articles are seized in connection with a valid arrest.

It follows that it was error to refuse petitioners' motion to exclude and suppress the property which was improperly seized. But since this property was contraband, they have no right to have it returned to them.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 427.—October Term, 1947.

Jack Trupiano, Romildo Riccardelli, Anthony Antoniole and Riordan J. A. Roett, Jr., Petitioners, v. United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[June 14, 1948.]

Mr. Chief Justice Vinson, with whom Mr. Justice Black, Mr. Justice Reed and Mr. Justice Burton concur, dissenting.

Federal officers, following a lawful arrest, seized contraband materials which were being employed in open view in violation and defiance of the laws of the land. Today, the Court for the first time has branded such a seizure illegal. Nothing in the explicit language of the Fourth Amendment dictates that result. Nor is that holding supported by any decision of this Court.

The material facts are not in dispute. In January, 1946, certain of the petitioners approached one Kell offering to rent a portion of the latter's farm on which a building was to be erected. His suspicions aroused, Kell reported the matter to agents of the Alcohol Tax Unit of the Bureau of Internal Revenue. He was advised that the offer could be accepted provided that nothing was done to entice petitioners into completion of their plans. An agent, Nilsen, was assigned to the farm to act the part of a farm hand in the employ of Kell.

Ultimately, an agreement was entered into whereby Kell rented a portion of his farm to petitioners at $300 a month. Petitioners, with the assistance of Kell and

Nilsen, constructed a barn-like structure some two hundred yards from the farmhouse. A still and vats were installed. After the still began operation, Nilsen acted as a "mash man" receiving a salary of $100 a week from petitioners. All sums received by Nilsen were turned over to the Federal Government.

Throughout this period, Nilsen reported regularly to his superiors. As a result of this information, federal agents on May 31, 1946, seized a truckload of alcohol about an hour after it had left the Kell farm.

The night of June 3, 1946, was chosen by the agents to conduct their raid. Kell cooperated fully with the officers and drove three of the agents to the farm in his own car. As the car entered the farm premises, the odor of fermenting mash and the sound of a gasoline motor became apparent. When the agents alighted from the car it was obvious that the sound and the odor were emanating from the building in which the still was located. One of the agents approached the structure and through an open door observed a still and a boiler. He also saw the petitioner Antoniole bending over a gasoline pump. The agent entered the building and placed Antoniole under arrest on the theory that a crime was being committed in his presence. Subsequently, the agent seized the still, mash vats containing fermenting mash, other distillery equipment, and 262 five-gallon cans containing illicit alcohol. Neither the arrest nor the seizure was effected under the authority of a warrant. Later six other persons were arrested, including three of the petitioners in this case.[1]

[1] Subsequently, petitioners moved the District Court to order the return of the property seized and to suppress its use as evidence. 70 F. Supp. 764 (1947). The motion was denied. The order was affirmed by the Circuit Court of Appeals in a *per curiam* statement. 163 F. 2d 828 (1947).

There can be no doubt that the activities of petitioners were in flagrant violation of the laws of the United States.[2] It is clear, also, that the materials seized consisted of instrumentalities used by petitioners in their criminal enterprise and contraband goods, possession of which is a crime. The materials and objects falling into the control of the federal agents, therefore, were of the type properly subject to lawful seizure.[3]

Further, it is obvious that entry of the federal agents onto the farm premises was in no sense trespassory or otherwise illegal. *Amos* v. *United States*, 255 U. S. 313 (1921); *Byars* v. *United States*, 273 U. S. 28 (1927). Kell, the owner of the farm, gave his active consent to the entry. Indeed, he voluntarily drove three of the agents to the premises in his own car.

Nor can there be doubt that the arrest of the petitioner Antoniole while engaged in the commission of a felony in the presence of the agent was a valid arrest. The majority of the Court explicitly concedes such to be the fact. Under the English common law, a police officer had power without a warrant to arrest persons committing a misdemeanor in the officer's presence and persons whom the officer had reasonable cause to believe had committed a felony. This rule, which had its origin in the ancient formative period of the common law, was firmly established at the time of the adoption of the Fourth Amend-

---

[2] See §§ 2803, 2810, 2812, 2814, 2831, 2833 of the Internal Revenue Code.

[3] *Boyd* v. *United States*, 116 U. S. 616, 623, 624 (1886); *Weeks* v. *United States*, 232 U. S. 383, 392–393 (1914); *Gouled* v. *United States*, 255 U. S. 298, 309 (1921); *Carroll* v. *United States*, 267 U. S. 132, 149–150 (1925); *Agnello* v. *United States*, 269 U. S. 20, 30 (1925); *Marron* v. *United States*, 275 U. S. 192, 199 (1927); *United States* v. *Lefkowitz*, 285 U. S. 452, 465–466 (1932); *Harris* v. *United States*, 331 U. S. 145, 154 (1947).

ment.[4] Since that time it has received general application by state and federal courts.[5] Indeed, this Court has heretofore given specific recognition to the rule. *Carroll v. United States*, 267 U. S. 132, 156–157 (1925).[6]

Thus, even though agents charged with enforcement of the laws of the United States made a lawful entry onto the farm and despite the fact that a valid arrest was made of a party who was in the act of committing a felony, the Court now holds that the arresting officer in the absence of a search warrant was powerless to make a valid seizure of contraband materials located in plain sight in the structure in which the arrest took place. And this despite the long line of decisions in this Court recognizing as consistent with the restrictions of the Fourth Amendment the power of law-enforcement officers to make reasonable searches and seizures as incidents to lawful arrests.

In *Agnello* v. *United States*, 269 U. S. 20, 30 (1925), this Court stated: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as well as weapons and other things to effect an escape from custody, is not to be doubted. . . . Such searches and seizures naturally and usually appertain to and attend such arrests."[7] And see *Weeks* v. *United States*, 232 U. S. 383, 392 (1914); *Carroll* v. *United States*, *supra* [illegible]158; *United States* v. *Lee*, 274 U. S. 559, 563 (1927); *Marron* v. *United States*, 275 U. S. 192, 198–199

[4] *Samuel* v. *Payne*, 1 Doug. K. B. 359 (1780); *Wakely* v. *Hart*, 6 Binn. 316 (1814). And see 2 Hale, Pleas of the Crown 85–97; 4 Blackstone, Commentaries 292–293; Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 673.

[5] *United States* v. *Daison*, 288 F. 199 (1923); *Rohon* v. *Sawin*, 5 Cush. 281 (1850); *Wade* v. *Chafee*, 8 R. I. 224 (1865).

[6] Cf. *Kurtz* v. *Moffett*, 115 U. S. 487, 498–499 (1885).

[7] And see *id.* at 32, 33.

(1927); *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 358 (1931); *United States* v. *Lefkowitz*, 285 U. S. 452, 465 (1932); *Harris* v. *United States*, 331 U. S. 145, 150–151, 168, 186 (1947).

The validity of the search and seizure as incident to a lawful arrest has been based upon a recognition by this Court that where law-enforcement agents have lawfully gained entrance into premises and have executed a valid arrest of the occupant, the vital rights of privacy protected by the Fourth Amendment are not denied by seizure of contraband materials and instrumentalities of crime in open view or such as may be brought to light by a reasonable search. Here there can be no objection to the scope or intensity of the search. Cf. *Marron* v. *United States, supra*; *Go-Bart Importing Co.* v. *United States, supra*; *United States* v. *Lefkowitz, supra*; *Harris* v. *United States, supra*. The seizure was not preceded by an exploratory search. The objects seized were in plain sight. To insist upon the use of a search warrant in situations where the issuance of such a warrant can contribute nothing to the preservation of the rights which the Fourth Amendment was intended to protect, serves only to open an avenue of escape for those guilty of crime and to menace the effective operation of government which is an essential precondition to the existence of all civil liberties.

In reaching its result the Court relies on *Taylor* v. *United States*, 286 U. S. 1 (1932). There, federal agents broke into a garage and seized a quantity of illicit liquor. At the time of entry, "No one was within the place and there was no reason to think otherwise." *Id.* at 5. The agents acted without the authority of a search warrant, nor, unlike the present case, was lawful entry into the building made for the purpose of effecting a valid arrest. Under these circumstances the Court ruled that the seizure was unlawful. But to apply that holding in a situa-

tion like the present where law-enforcement officers have entered a building to arrest a party openly engaged in the commission of a felony, is to disregard the very basis upon which the *Taylor* case was decided.

We are told, however, that although the petitioner Antoniole was arrested while undeniably engaged in the commission of a felony, his presence in the building in which the contraband materials were located was a "fortuitous circumstance which was inadequate to legalize the seizure." We should suppose that any arrest of a party engaged in the commission of a felony is based in part upon an element of chance. Criminals do not normally choose to engage in felonious enterprises before an audience of police officials. We may well anticipate the perplexity of officers engaged in the practical business of law enforcement when confronted with a rule which makes the validity of a seizure of contraband materials as an incident to a lawful arrest dependent upon subsequent judicial judgment as to the "fortuitous" circumstances relating to the presence of the party arrested on the premises in which the illegal goods are located.

Nor are we free to assume that the agents in this case would have proceeded illegally to seize the materials in the barn in the absence of the justification of a valid arrest. A lawful seizure is not to be invalidated by speculations as to what the conduct of the agents might have been had a different factual situation been presented.

The case of *Johnson* v. *United States*, 333 U. S. 10 (1948), does not support the result which the Court has reached. For there the majority of the Court held that the arrest in question was an invalid one. Obviously, a search and seizure may not be held valid on the sole ground that it was an incident to an invalid arrest. Such is not the situation here.

In *Carroll* v. *United States*, *supra* at 149, this Court observed: "The Fourth Amendment is to be construed in

the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens." We believe that the result reached today is not consistent with judicial authority as it existed before the adoption of the Fourth Amendment nor as it has developed since that time. Nor do we feel that the decision commends itself as adapted to conserve vital public and individual interests. Heretofore it has been thought that where officers charged with the responsibility of enforcement of the law have lawfully entered premises and executed a valid arrest, a reasonable accommodation of the interests of society and the individual permits such officials to seize instrumentalities of the crime and contraband materials in open view of the arresting officer. The Court would now condition this right of seizure after a valid arrest upon an *ex post facto* judicial judgment of whether the arresting officers might have obtained a search warrant. At best, the operation of the rule which the Court today enunciates for the first time may be expected to confound confusion in a field already replete with complexities.